The Secretary of Energy
Washington, DC 20585

April 12, 2002

The Honorable Jim Hodges
Governor of South Carolina
Columbia, South Carolina 29211

Dear Jim:

Thank you for your letter of yesterday. I am pleased that the assurances I offered in my letter of that same date are acceptable to you in terms of their content. The remaining issue seems to be limited to how we go about formalizing our agreement on these terms.

Before discussing that in detail, I do want to start out by explaining why I believe that even without the proposal I transmitted yesterday, the Administration has already gone to considerable lengths to provide more than a unilateral promise from me as Secretary of Energy designed to address your concern that any plutonium that comes into South Carolina have a pathway out. First, after you raised that concern as stemming from uncertainty about the United States' disposition plans overall, we accommodated it by refraining from moving any plutonium into South Carolina for an initial period of seven months, until the National Security Council's review of disposition options was complete. At the end of that period, the Administration announced a formal policy decision that it was reaffirming the prior Administration's agreement with the Russian Federation regarding plutonium disposition. It also announced that it intended to implement that agreement by fabricating plutonium destined for disposition under that agreement into Mixed Oxide (MOX) fuel. And it transmitted a formal letter and report to Congress stating that this was its intention.

Second, at the beginning of February, the President announced inclusion of funding for the plutonium disposition plan, including the MOX facility, in his FY 03 budget. And third, the FY 03 budget also included an out-year funding profile for the MOX facility, thereby demonstrating more than a one year commitment to the program on the part of the Administration.

These announcements were the culmination of a formal interagency policymaking process by all affected elements of the Administration on a key foreign policy issue. They are not the kinds of decisions an Administration changes lightly. Since you had previously agreed to accept shipments proposed by the prior Administration without any additional commitments, in the judgment of many observers these announcements alone should have been sufficient to allay your concerns.

Nevertheless, you indicated that South Carolina still wanted further assurances. In response, we continued to refrain from shipping any plutonium for an additional three months while we sought to determine what you felt was needed and provide it. From your letter of yesterday, I understand that we have now agreed on the content of these assurances, consisting of four specific points: a timeline and milestones for design and construction of the MOX facility; a funding profile for that facility; limitations on the timing and amounts of plutonium we propose to ship while that facility is being completed; and a commitment to remove any plutonium brought into the State if the facility is not built and operating on schedule.

You then stated that you wanted some means of enforcing these commitments. It seemed to me that a formal written assurance from me, contained in a signed agreement, should address that concern, since that is the kind of commitment that an Administration walks away from unilaterally only at considerable political peril. You stated, however, that you were seeking a legally enforceable approach. We explained that there were potentially insuperable limits on the Executive Branch's authority to enter into such an agreement because we cannot superimpose a legally binding policy limit of our own devising that has not been legislated by Congress. Nevertheless, after giving much thought to the question, we devised a unique solution that does give the State a substantial measure of enforceability by offering to incorporate the limitations we were committing to in the written agreement into a formal Record of Decision enforceable through the National Environmental Policy Act. You then suggested that as an additional protection, the State would like language stating that any further modification to that Record of Decision ("ROD") that related to the terms of the agreement would constitute a material change, and we have now incorporated that language into the proposed ROD.

That accomplished, I believed we had addressed every issue and that we should be in a position to move forward. At that point, however, you suggested that since what prevented us from binding ourselves further was the lack of a relevant legislative limitation on our authority, perhaps this could be addressed through a legislative change. As you know, that too implicates an interagency process, since Cabinet Departments cannot unilaterally commit to supporting legislation. It is also an extraordinary act for the Executive Branch to support legislation limiting its own discretion, especially on a matter of this type implicating significant national security interests of the United States. Nevertheless, after considerable deliberation, the Administration has accommodated you even on that point, as manifested by my inclusion in yesterday's letter of a legislative proposal that would actually put into positive law a requirement that the Department of Energy remove any plutonium brought to Savannah River if the MOX facility is not constructed and operating on schedule. The final objection I heard you had raised was that the legislation might not be enacted. Yesterday, therefore, we added to our proposal a

commitment that we would ship no more than 3.2 metric tons of plutonium before October15, 2002, and that if the legislation were not enacted by that time, we would suspend shipments.

Your latest suggestion of yesterday, however, that the Department of Energy and South Carolina essentially turn these issues over to the courts by entering into a consent decree, goes beyond what we can do. In the first place, there is real doubt whether we have the legal authority to take such an action. As I indicated before, there is no relevant legislative limitation that requires the United States to do what we have offered to do, and the Executive Branch is not free to impose one on its own. Using the pretext of a lawsuit on unrelated issues as the occasion to ask a court to impose such limitations without prior Congressional action seems to me to be of dubious legality and propriety. In the second place, it would be wholly irresponsible for the country to attempt to conduct its national security and foreign policy affairs through the judicial process, but that is what we effectively would be committing ourselves to doing. The courts are an appropriate forum for handling lawsuits, not for performing such Executive Branch duties as overseeing and implementing the U.S.-Russian nuclear non-proliferation agreement. This is especially true at this time, when we have clear evidence that terrorist groups are seeking access to nuclear materials.

In the third place, there is no mechanism under which the Department of Energy and South Carolina can simply go to the courts and ask them to ratify and enforce an agreement that we and the State devise. Rather, once this matter is in litigation, other parties will be entitled to try to intervene and gain status to influence current and future decisions on these issues. Even groups who oppose the objectives or the particulars of our non-proliferation programs, for example those who oppose construction of any MOX facility, could inject themselves into the process. The result would be to turn over to the courts decisions that are integrally related to the foreign policy of the United States, up to and including how much plutonium the United States disposes of and when it disposes of it. Moreover, under a litigation or consent decree scenario, that could happen not only today, but even ten years from now.

I believe the prior steps I have taken, as outlined above, demonstrate my strong personal interest in and commitment to accommodating the reasonable requests of the State of South Carolina. I also believe my proposal of yesterday actually addresses each of the concerns you have raised. I hope that rather than electing to throw this matter into litigation, thereby vastly complicating its resolution, you will

reconsider, accept the proposal I have offered, sign the proposed agreement which I believe gives you very substantial protection against a unilateral change of course, and if you believe more is needed, join hands with me to seek swift passage of the legislation I have proposed. That would allow us to move forward together in the best interests of the people of South Carolina and the United States.

Sincerely,

Spencer Abraham

Spencer Abraham

Jim -
Let's work together to get these legislation done in the next 30 days.

Spencer